

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

UNITED STATES OF AMERICA,

Plaintiff,

:

Case No. 1:98-cr-032

-vs-

District Judge Susan J. Dlott

Chief Magistrate Judge Michael R. Merz

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LINDA DUNCAN,

Defendant.

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**REPORT AND RECOMMENDATIONS**

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This case is before the Court on Defendant's Motion to Vacate or Modify Sentence pursuant to 28 U.S.C. §2255 (Doc. No. 137). The matter has been referred to the undersigned United States Magistrate Judge for report and recommendations under 28 U.S.C. §636(b)(Doc. No. 159).

Upon initial review of the Motion, Judge Dlott ordered the Government to Answer (Doc. No. 139). The Government did so, asserting the District Court lacked jurisdiction of the Motion because it was a second motion under 28 U.S.C. § 2255 on which a district court may not proceed without permission of the Court of Appeals (Doc. No. 140). Thereafter, Judge Dlott stayed the matter pending a ruling by the Court of Appeals (Doc. No. 141).

The Court of Appeals has now ruled that Defendant may not proceed on this second motion because it does not come within the allowed parameters for a second § 2255 Motion (Order, Doc. No. 145).

Accordingly, it is respectfully recommended that the instant Motion be denied.

February 8, 2007.

s/ Michael R. Merz  
Chief United States Magistrate Judge

### **NOTICE REGARDING OBJECTIONS**

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within ten days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(e), this period is automatically extended to thirteen days (excluding intervening Saturdays, Sundays, and legal holidays) because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(B), (C), or (D) and may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within ten days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F. 2d 947 (6<sup>th</sup> Cir., 1981); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).